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No. 06-502

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In The

Supreme Court of the United States

OLIVIER BANCOULT, *et al.*,

Petitioners,

v.

ROBERT S. McNAMARA, *et al.*,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

REPLY BRIEF FOR PETITIONERS

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INTRODUCTION

Respondents' brief wrongly states that Petitioners' comity arguments were improperly raised and that this Court's review is therefore foreclosed. In addition, Respondents mischaracterize several of Petitioners' positions on justiciability. This reply attempts to clarify the record for this Court.

I. RESPONDENTS' COMITY ARGUMENTS FAIL TO RECOGNIZE PETITIONERS' CONSISTENT REFERENCE TO PARALLEL BRITISH LITIGATION AND THE LOWER COURTS' RELIANCE ON THE HISTORIC BRITISH/U.S. ALLIANCE

The government's arguments concerning comity are disingenuous. From its inception, this case has been part of a parallel litigation process that seeks to address the responsibility of U.S. and UK officials who perpetrated wrongs against the Chagossians. Petitioners have continuously informed the lower courts of this parallel litigation. Indeed, the complaint referred to both the British litigation (Compl. ¶ 8) (citing *The Queen v. Secretary of State for the Foreign and Commonwealth Office: ex parte Bancoult* 2 W.L.R. 1219 (QBD (Admin. Ct.)) (2000)) and principles of comity. (Compl. ¶ 3(h)) ("The following . . . form the basis of Plaintiffs' cause of action. . . . Customary international law and principles of comity . . . ").

Petitioners have also informed the U.S. District Court of developments in the UK litigation. For example, the Plaintiffs' Proposed Order for Preliminary Injunction specifically reported the British High Court's November 2000 decision and the problems posed by U.S. refusal to comply with that decision. (Pls.' Proposed Order for Prelim. Inj. 3, 9,

18-19; *see also* Pls.' Opp'n to Def. United States of America Mot. to Dismiss 3; Pls.' Consol. Opp'n to Individual Fed. Def.'s Mot. to Dismiss and Cross-mot. to Strike Certification of Scope of Employment p. 5, 34-35; Second Am. Compl. ¶ 8; First Am. Compl. ¶ 8) (referring to parallel litigation in Britain).

Moreover, the U.S. government took an active role in the British litigation without informing Petitioners or the U.S. courts of its participation in these proceedings. *See Bancoult II* ¶ 97. Petitioners discovered the U.S. government's participation in the British litigation from UK counsel. It is therefore incorrect to claim that the government or the U.S. courts were somehow unfairly left in the dark. Indeed, one wonders why government counsel, whose factual submissions and legal arguments were soundly rejected by the British High Court, did not bring these matters to the attention of the U.S. courts.

The Court of Appeals also relied on principles of comity in its decision in this case, emphasizing the "special relationship between the British Commonwealth and Empire and the United States." *Bancoult v. McNamara*, 445 F.3d 427, 429 (D.C. Cir. 2005) (quoting *Blood, Toil, Tears and Sweat: The Speeches of Winston Churchill* 301 (David Cannadine ed., 1989)). After the Court of Appeals decision, the British High Court overruled the Queen's 2004 Orders in Council and found that the Chagossians' claims were valid and justiciable. *The Queen ex parte Bancoult v. Secretary of State for Foreign and Commonwealth Affairs* [2006] EWHC 1038 (Admin.) (*Bancoult II*). This judgment necessitates further inquiry into Petitioner's claims in accordance with the Court of Appeals reliance on the historic British/U.S. relationship. *Id.* In an effort to keep the U.S. courts informed and allow them to

consider recent developments in the British litigation, Petitioners filed a rehearing petition less than one month after the British High Court handed down its decision. (Pls.' Pet. for Reh'g or Reh'g En Banc.)

II. RESPONDENTS' POSITIONS ON JUSTICIABILITY ARE FACTUALLY INCORRECT

Respondents mischaracterize Petitioners' political question arguments in several instances. The government states that Petitioners question the validity of the BIOT agreement and the subsequent removal of the Chagossian population. Resp.ts' Br. 9-10. Rather than challenging the Executive's ability to negotiate the BIOT agreement with Britain and to depopulate Diego Garcia to further U.S. national security interests, Petitioners challenge the torture and starvation of the Chagossians during their removal. The U.S. government could have achieved its policy objective of establishing a military base without the use of torture and starvation.

Petitioners have consistently argued that the government is liable because of the manner in which it *implemented* the BIOT agreement, not the validity of the agreement itself. This distinction is vital because courts typically allow challenges to the legality of the implementation of policy while declining to consider the propriety of the underlying policy decision. *See, e.g., Lamont v. Woods*, 948 F.2d 825, 833 (2d Cir. 1991) (holding that the case did not present a nonjusticiable political question because it challenged the implementation of a policy decision); *Planned Parenthood Fed'n of Am., Inc. v. Agency for Int'l Dev.*, 838 F.2d 649, 655-56 (2d Cir. 1988) (citations omitted) ("While courts are not competent to formulate national

policy or to review controversies which 'revolve around policy choices and value determinations constitutionally committed' to Congress or the executive branch, it is a court's duty to determine whether the political branches, in exercising their powers, have 'chosen a constitutionally permissible means of implementing that power.'"); *DKT Memorial Fund, Ltd. v. Agency for Int'l Dev.*, 810 F.2d 1236, 1238 (D.C. Cir. 1987) ("We reject the district court's suggestion that appellants' challenges to AID's actions present nonjusticiable political questions. This court recently held that whereas attacks on foreign policymaking are nonjusticiable, claims alleging non-compliance with the law are justiciable, even though the limited review that the court undertakes may have an effect on foreign affairs."). Petitioners have consistently limited the scope of review to the legality of the Executive Branch's implementation of its agreement with the British government. *See* Appellants' Br. 8-16 (acknowledging that the agreement between the U.S. and the UK to depopulate the Chagos islands was beyond the scope of review while challenging the legality of Executive actions taken to implement the agreement); Second Am. Compl. ¶¶ 21-30 (seeking damages based on the actions Respondents took in violation of international law).

Respondents also argue that Petitioners wish to exclude consideration of the "threshold question of justiciability" through discussion of this Court's statements on justiciability in *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004). Resp.ts' Br. 14. This is another mischaracterization of Petitioners' arguments. Petitioners wish this Court to "clarify the interplay between the 'discriminating inquiry' required by *Baker* and the analysis required by *Sosa*." Pet.rs' Br. 17 (internal citations omitted). The proper

application of *Sosa's* justiciability discussion in light of the *Baker* factors is a vital federal question. *Baker v. Carr*, 369 U.S. 186 (1960); *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004).

CONCLUSION

For the foregoing reasons, we respectfully submit that this Court should grant the petition for certiorari.

Respectfully submitted,

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